

Protest of) Date: February 24, 1987
WESTPAC AIRLINES, INC.)
Solicitation No. ASEG-87-01) P.S. Protest No. 87-04

DECISION

Westpac Airlines, Inc., (Westpac) has protested the contracting officer's determination that it was nonresponsible under Solicitation No. ASEG-87-01 for contracts for air mail transportation service between a large number of origin-destination city pairs within the United States. The solicitation, which was issued by the Transportation and International Services Office in Postal Service Headquarters, contemplated the separate procurements of approximately 3,100 "windows", each described by an origin and destination city and a time frame in which the transportation service must be performed. According to the contracting officer, Westpac submitted the lowest technically acceptable price offers for five of the windows solicited.^{1/}

The contracting officer determined that Westpac was nonresponsible because of the default termination of its previous air mail transportation contracts and Westpac's failure to demonstrate that it presently had the financial and managerial resources to provide service of the required size and scope.

Westpac disputes the contracting officer's determination on several grounds:

^{1/} Westpac submitted the lowest technically acceptable price offers for the following windows:

<u>Window Control No.</u>	<u>Origin/Destination Airport</u> <u>Designators</u>
71994	LAX-SEA
72922	PHX-ABQ
73314	SFO-SLC
73375	SLC-LAX
73388	SLC-SFO

1. Westpac claims to have operated several passenger and freight routes larger in scope than the contemplated contract service.
2. Westpac's top managerial and operating personnel are all approved by the Federal Aviation Administration.
3. Westpac holds operating certificate authority issued by the Civil Aeronautics Board to engage in air transportation as an all-cargo carrier under Section 418 of the Federal Aviation Act of 1958, as amended, (the Act) and as a commuter air carrier under Section 419(c)(2) of the Act, predicated on findings that Westpac is "fit, willing and able" to provide such service.
4. Westpac's Dun and Bradstreet credit rating of 3A3 is higher than that of other small air carriers which were awarded contracts.
5. The default terminations of Westpac's previous contracts were in violation of a federal court order issued in pending litigation between Westpac and the Postal Service.

The contracting officer's response to the protest includes the following points:

1. A request for investigation by Dun & Bradstreet (D&B) using the D&B number provided by Westpac produced a report for a different corporate entity, Western Pacific Express, Inc. (Western Pacific), with a different business address than Westpac, and a statement that the business report for Western Pacific was "too old to print". D&B had no listing for Westpac in its own name. Westpac provided no information on its financial resources to the contracting officer, whose several attempts to contact Westpac by mail and telephone to request such information were unsuccessful.
2. Westpac was terminated for default under 13 segment windows awarded under air transportation Solicitations Nos. ASEG-85-01 and ASEG-85-03, for failure to perform service and anticipatory breach of the contracts. These termination actions, which were taken in March and April 1985, are being challenged by Westpac in a pending suit in the U.S. Claims Court.
3. Westpac has not, since the default terminations, published any flight schedules in the Official Airlines Guide.
4. In response to interrogatories executed on September 22, 1986, in the pending Claims Court litigation, Westpac

stated that it has not operated any aircraft since March 20, 1986.

5. Westpac's reliance on its CAB certification as evidence of responsibility is misplaced because the certifications are four years old, and are not conclusive as to responsibility in relation to the present contract.
6. The contracting officer has no knowledge of any court order restraining the Postal Service in any manner in its business dealings with Westpac.

This office's review of a nonresponsibility determination is limited. As we stated in Craft Products Company, P.S. Protest No. 80-41, February 9, 1981:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

See also Valley Precision Works, P.S. Protest No. 85-64, October 11, 1985; Hi-Line Machine, Inc. and Gardner Industries, Inc., P.S. Protest No. 85-6, March 7, 1985; Tradewind Industries, Inc., P.S. Protest No. 85-1, February 14, 1985.

If the information obtained concerning a contractor's responsibility does not indicate clearly that the prospective contractor is responsible, the contractor must be found nonresponsible. Postal Contracting Manual 1-902. Similarly, if there is doubt as to the contractor's ability to perform or its past performance cannot be resolved affirmatively, the contractor must be found nonresponsible. Currency Technology Corporation, P.S. Protest No. 85-22, July 8, 1985; Spectral Data, Inc., P.S. Protest No. 82-58, November 11, 1982. See also Universal American Enterprises, Inc., Comp. Gen. Dec. B-185430, November 1, 1976, 76-2 CPD & 373; Contract Maintenance, Inc.; Merchants Building Maintenance Company, Comp. Gen. Dec. B-181581, October 8, 1974, 74-2 CPD & 193.

In this case the file suggests that the contracting officer had ample reason to view Westpac's responsibility skeptically. Westpac had defaulted on previous contracts early in 1985,^{2/} and reliable evidence showed that since that time

^{2/} Standing alone, default terminations occurring in the remote past are ordinarily inadequate support for a default termination. See Don L. Peterson, P.S. Protest No. 84-56, August 10, 1984, and cases cited

Westpac had not operated on any published flight schedules or owned any aircraft, was not responding to communications by mail or telephone,^{1/} and its creditworthiness was not currently rated by D&B.^{1/} We see nothing in Westpac's submissions which would cause us to conclude that the contracting officer erred in determining that Westpac was not currently responsible.

The contracting officer reasonably gave no weight to the fact that more than four years ago the Civil Aeronautics Board (CAB) issued certificate authority to Westpac. Possession of such authority shows only that at one time the CAB determined that Westpac met the minimum legal requirements to engage in commercial air transportation.^{1/} It is not probative of Westpac's present responsibility as a prospective Postal Service contractor. Licensing by the FAA of Westpac's officers and employees is similarly immaterial. Westpac's claims to have recently operated passenger and freight service and to hold a D&B credit rating have not been substantiated. The existence of a court order restraining the Postal Service from terminating Westpac's previous contracts for default has not been established.^{1/}

The protest is denied.

(..continued)

therein. They may, however, be taken into consideration along with other evidence of a pattern of continuing business activity suggesting nonresponsibility. See C. W. Girard, C.M., 64 Comp. Gen. 175 (1984); S.A.F.E. Export Corporation, Comp. Gen. Dec. B-209491, August 2, 1983, 83-2 CPD & 153.

^{3/} It was reasonable for the contracting officer to take the unavailability of the contractor's management into account in his responsibility determination. See Martin Widerker, Engineer, Comp. Gen. Dec. B-219872, November 20, 1985, 85-2 CPD & 571. We note that Westpac's copy of the contracting officer's statement on the protest, which was mailed to Westpac's post office box address by Express Mail on January 28, 1987, was returned as unclaimed after being available from January 29 until February 6, 1987.

^{4/} Lacking current financial information from Westpac, the contracting officer acted within his discretion in relying on the negative D&B analysis. See United Chem-Con Corporation and North American Manufacturing Corporation, P.S. Protests Nos. 86-45 and 86-47, August 27, 1986.

^{5/} Section 401(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. ' 1371(a), provides that:

No air carrier shall engage in air transportation unless there is in force a certificate issued by the [Civil Aeronautics] Board authorizing such air carrier to engage in such transportation.

^{6/} In his determination of responsibility a contracting officer may use facts, including prior default terminations, which are or may be contested in litigation. Hunter L. Todd, P.S. Protest No. 85-78, October 18, 1985.

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[Checked against original 2/17/93 WJJ]